UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

THE OHIO BELL TELEPHONE COMPANY

and Case 09-CA-233901

RICK WHITMER, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ITS BRIEF FILED IN SUPPORT THEREOF

I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this answering brief to Respondent's exceptions to Administrative Law Judge Christine Dibble's decision which issued on March 26, 2020. Judge Dibble correctly concluded that Respondent violated Section 8(a)(1) and (3) of the Act by issuing certain employees attendance occurrences, placing attendance punctuality discussion documents in their files, and by issuing them written warnings because the employees assisted the Union and engaged in protected concerted activities by reporting to work not wearing their uniforms, and doing so in protest of Respondent's refusal to provide new uniforms, and to discourage employees from engaging in these or other concerted or union activities in violation of Section 8(a)(1) and (3) of the Act. (ALJD pp. 9-14) [1/] For the reasons set forth herein, Respondent's exceptions to the Administrative Law Judge's decision, including the factual findings, analysis, and legal conclusion, are without merit.

[1/] References to the Administrative Law Judge's Decision will be designated as (ALJD p. ___); references to the trial transcript will be designated as (Tr. ____); references to the General Counsel's exhibits are designated as (G.C. Ex. ___); and references to Respondent's exhibits are designated as (R. Ex. ___).

II. The ALJ Correctly Found That Employees Engaged in Protected Concerted Activity and Union Activity by Arriving at Work in Various Degrees of Street Clothing to Protest Respondent's Failure to Provide Them With Replacement Uniforms (Exceptions 1, 8)

Respondent excepts to the Administrative Law Judge's determination that it unlawfully issued discipline, attendance occurrences, and/or placed attendance punctuality documents in personnel files of 27 premises technicians. In support of its argument, Respondent maintains that the employees did not engage in protected concerted activity because they did not tell management why or what they were allegedly protesting. The record evidence and relevant caselaw supports the Administrative Law Judge's findings that the employees engaged in protected concerted and union activity, that Respondent was aware of that activity, and that Respondent issued employees discipline as a result of that activity.

The Administrative Law Judge correctly recognized that Section 7 of the Act provides that employees have the right to engage in concerted activities for their mutual aid and protection. (ALJD p. 8) An employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities. (ALJD p. 8) The Administrative Law Judge also correctly found that employees, through the help of their union stewards, jointly presenting their shared grievances to their employer constitutes a concerted activity and union activity which Section 7 of the Act was designed to protect, and that the premises technicians engaged in protected concerted activity when they jointly discussed their concerns about uniforms and decided to report to work in their street clothes in order to protest working conditions (i.e., insufficient supply of uniforms and a mandatory 6-day workweek). (ALJD p. 9)

Although Respondent maintains that the employees were not engaged in protected concerted activity because they did not tell management why or what they were allegedly protesting, the record reflects, and the Administrative Law Judge correctly recognized, that Respondent was aware of the protected concerted nature of the activity.

Knowledge of the concerted nature of activity must be established to sustain a violation of Section 8(a)(1) or (3) of the Act, and in this case, the Administrative Law Judge correctly acknowledged that Respondent was aware that the employees' actions were concerted. (ALJD pp. 9, 13) Circumstantial evidence of employer knowledge may be entirely valid to support a finding that an employee was disciplined because of activities protected by the Act. *Needell & McGlone, P.C.*, 311 NLRB 455, 456 (1993). As noted by the Administrative Law Judge, in *Kysor Indus. Corp.*, 309 NLRB 237 (1992), the Board found that an employer knew that employees who assembled at a supervisor's desk to seek clarification of their work assignments were engaged in protected concerted activity notwithstanding that the employees did not explain their confusion was related to two notices the employer recently issued. (ALJD p. 9)

As in *Kysor Indus. Corp.*, here, the Administrative Law Judge correctly found that Respondent was aware that the premise technicians were engaging a concerted protest. (ALJD pp. 9, 13) In addition to the specific testimony cited in support of that finding by the Administrative Law Judge (ALJD pp. 9, 13), the supervisors would have been immediately aware of the concerted nature of the activity simply visually – about half of the employees in question were not wearing their uniforms. (Tr. 54, 170, 255; G.C. Exs. 5, 6, 7) Moreover, Respondent's response to the action, with supervisors discussing the matter amongst themselves and contacting higher-ups, also shows that they were aware of its concerted nature. (Tr. 171, 316, 338) Supervisor Scott Jones testified that he believed the employees' conduct was a

potential work action. (ALJD p. 9; Tr. 316) Director of Labor Relations Stephen Hensen also knew about the concerted nature of the activity, as it was reported to him that "a couple of garages were participating in something because. . . a large number of employees came to work without the appropriate branded apparel." (Tr. 256) He testified that he did not want the action to spread. (Tr. 259; ALJD p. 9) The discipline employees received was identical regardless of the details of what they chose to wear and how quickly employees were able to change, and at the Ternstedt garage, the entire crew received the discipline as a group rather than in individual meetings. (Tr. 272; G.C. Exs. 4, 5, 6, 7) Employees also raised the fact that the issue was concerted or union-led in their investigatory meetings and when they were issued discipline. (G.C. Exs. 6, 7; ALJD pp. 9, 13) Thus, Respondent was undoubtedly aware of the concerted and union-organized nature of the action. See, e.g. *Kysor Indus. Corp.*, 309 NLRB 237 (1992). As soon as Respondent was factually aware or put on notice that the employees were making a concerted complaint, Section 7 protections of the Act attached to the employee conduct, regardless of what specifically employees communicated about their intentions or motives. *Id.*

III. The ALJ Correctly Found That the Employees Did Not Lose Protection of the Act in Arriving At Work In Street Clothes, and Respondent Violated Section 8(a)(1) and (3) of the Act When It Issued Them Discipline, Attendance/Punctuality Discussions, and Attendance Occurrences (Exceptions 1, 2, 3, 4, 6, 7, 12)

Respondent excepts to the Administrative Law Judge's determination that it unlawfully issued discipline, attendance occurrences, and/or placed attendance punctuality documents in personnel files of 27 premises technicians because they violated allegedly established and uniformly enforced work rules by wearing jeans and other casual clothing in violation of Respondent's dress code. Respondent further excepts to the Administrative Law Judge's finding that Respondent's dress code was not consistently applied. Respondent also argues that the

employees engaged in an unprotected partial strike. The record evidence and relevant caselaw supports the Administrative Law Judge's findings.

A. The ALJ Correctly Found that Respondent Did Not Uniformly Enforce Its Branded Apparel Policy (Exception 1, 6, 7)

As recognized by the Administrative Law Judge, a presumptively valid rule may violate the Act if it is applied in a disparate fashion. See, *Emergency One, Inc*., 306 NLRB 800 (1992) (respondent unlawfully restricted conversation about union matters during work time, while permitting conversations about other nonwork matters); see also, *Bally's Park Place*, 355 NLRB 1319 (2010) (an employee was discharged for using 20 minutes of FMLA leave to attend a union rally. The employer was unable to prove that it would have discharged the employee, an outspoken union supporter, absent union activity and the Board found a violation of the Act); *ITT Industries, Inc.,* 331 NLRB 4 (2000); *Lawson Co*., 267 NLRB 463, 473 (1983).

According to Respondent's premise technician guidelines, employees are required to wear "branded apparel." (Tr. 42, 72, 77-78, 151-152, 182, 211, 224-228, 290, 312-313, 332; R. Ex. 3) Those guidelines address employee attire for customer-facing interactions. (Tr. 312; R. Ex. 3) The Administrative Law Judge correctly found, however, that Respondent does not consistently enforce this policy at its Ternstedt and Dublin garages. (Tr. 126-129, 160, 205, 290-291, 313-314; ALJD p. 11) Employees are able to, and do perform job functions in clothing other than branded apparel. (Tr. 104-105, 292)

The evidence established that officially, the branded apparel consists of a blue shirt with Respondent's logo, navy blue pants with Respondent's logo, and if necessary, a hat with Respondent's logo and a jacket with Respondent's logo. (Tr. 42-44, 126-128, 130, 151-154, 201-203, 313) However, despite the branded apparel program policy stating that branded apparel is mandatory, Respondent typically allows employees to wear pants of their own

choosing. (Tr. 46, 127-128, 160, 291-292) For example, Premise Technician and Union Steward Rick Whitmer wears Duluth Trading Company khaki pants. (Tr. 46, 47, 49, 57-58, 84, 120) He has never been disciplined for doing so. (Tr. 48-49) Other employees do the same. (Tr. 47, 127-128, 160, 334) Whitmer testified that he has seen employees including Jeremy Mitchell, Darin Hively, and Josh McQuinton wearing jeans and be instructed by management to proceed to work anyway. (Tr. 47, 85-86) Former Premise Technician and Union Steward Nick Phillips has also seen employees wear jeans without recourse. (Tr. 127-128) Premise Technician and Union Steward Aaron VanVickle has seen employees wear Carhartt, Dickie, and Field & Stream brand pants in navy, brown khaki, green, gray, and charcoal. (Tr. 160-161) Supervisor Renee Matney admits that on at least one occasion, she has allowed a premise technician to wear jeans. (Tr. 292) In the wintertime, employees are allowed to wear jackets that are not branded apparel. (Tr. 47-48, 86, 130, 162-163, 177-178, 205, 295, 327-328, 343-344)

Other than the instance in question, Respondent has never issued any employee a documented verbal warning for a branded apparel policy violation. (Tr. 303-304, 324-325, 343-344) Supervisor Griffin admits that on at least one occasion, an employee arrived for a morning meeting in a union shirt rather than a branded apparel shirt and that employee was not disciplined for doing so. (Tr. 342) Employees also took a lot of liberties with what kinds of hats they wore. (Tr. 129, 163-164, 205, 292-293, 324) At most, an employee would be asked to remove the non-conforming hat, but even this was rare. (Tr. 129, 293, 324, 327, 335-336) Despite seeing employees regularly wear non-branded apparel, employees and Union Stewards Nicholas Phillips, Richard Whitmer, and Aaron VanVickle all testified that they had never sat in on any discipline meetings regarding employees not wearing branded apparel other than on the instance

in question. (Tr. 48, 128-130, 161, 163-164, 176, 195-196) VanVickle was not even aware employees could receive a documented verbal warning for branded apparel violations. (Tr. 176, 195-196)

Consistent with the Administrative Law Judge's findings, the record reflects that in prior instances when employees violated Respondent's branded apparel program, employees were either permitted to continue doing so or were simply verbally asked to change their clothing. (Tr. 47-49, 86, 127-130, 160, 162-163, 177-178, 205, 291-292, 295, 313-314, 327-328, 343-344; ALJD p. 11) Aside from the matter in question, Respondent provided no evidence of any employee at the Ternstedt or Dublin garages receiving documented verbal warnings, attendance/punctuality discussions, or being asked to return home to retrieve their branded apparel. Supervisors Renee Matney, Scott Jones, and Ed Griffin all admitted that other than the instance in question, they have never issued any employee a documented verbal warning for a branded apparel policy violation. (Tr. 303-304, 324-325, 343-344) Respondent's exception #7, to the Administrative Law Judge's statement that "Matney and Griffin acknowledged that for the dress code violations they have observed, they have not issued discipline," is incorrect as the transcript clearly states:

> Tr. 292:
>
> "Counsel for the General Counsel: In your experience as a prem tech manager, have you knowingly allowed prem techs to wear jeans to work?"
>
> "Mattney: Personally, myself, I had one occasion where I allowed a prem tech to wear jeans."
>
> Tr. 303:
>
> "Counsel for the General Counsel: First, you mentioned that there was one occasion in which you allowed someone that worked under you to wear jeans. When you did that, did you write that person up?"

"Mattney: I did not."

Mattney then went on to indicate that she has never written up any other employees for wearing any other non-jeans types pants, hats, or coats. (Tr. 303-304) To the extent that Matney may have done some kind of "coaching" for the employee who wore jeans, Respondent introduced no evidence of such a coaching being considered discipline. Moreover, if such coaching did take place, it simply serves as evidence of disparate treatment, as the employees in question here received greater discipline than the allegedly coached employee who wore jeans for a reason unconnected with protected concerted activity.

Although Respondent maintains in its exceptions that Supervisor Edward Griffin did not testify that he declined to issue discipline to any premises technicians who wore jeans, this ignores testimony, as correctly cited by the Administrative Law Judge, that Griffin had not issued discipline for other dress code violations he has observed. For example, Griffin admits that on at least one occasion, an employee arrived for a morning meeting in a union shirt rather than a branded apparel shirt and that employee was not disciplined for that dress code violation. (Tr. 342) Because Respondent has not previously issued this kind of discipline to employees for branded apparel policy violations, the Administrative Law Judge correctly found that Respondent's dress code was not consistently applied, and it cannot rely on its written but unenforced guidelines to discipline employees. Moreover, to the extent that Respondent attempts to draw a distinction between jeans and other portions of its dress code, the evidence established that Mattney had allowed an employee to wear jeans, and that Whitmer had seen employees including Jeremy Mitchell, Darin Hively, and Josh McQuinton wearing jeans and be instructed by management to proceed to work anyway. (Tr. 47, 85-86, 303) Former Premise Technician and Union Steward Nick Phillips has also seen employees wear jeans without

recourse. (Tr. 127-128) Respondent cannot selectively enforce its policy, whether with respect to jean or all clothes, and then only impose discipline upon employees who engage in protected concerted activity.

B. Respondent Issued its Employees Documented Verbal Warnings for Their Protected Concerted Activity. (Exceptions 9 and 10)

Respondent excepts to the Administrative Law Judge's finding that Stephen Hansen recommended written warnings and suspensions for employees' conduct on September 7, 2018, and her finding that employees received a written warning or suspension for such conduct. Respondent is correct that Hansen testified that he recommended documented verbal warnings to employees for their conduct. (Tr. 264) However, verbal warnings are documented in employee files, so to the extent that the Administrative Law Judge is describing that written documentation of such verbal warnings exists, the statement is accurate. (Tr. 176; G.C. Exs. 2, 3, 5, 6, 7)

Employees also received attendance/punctuality occurrences. (G.C. Ex. 4) Moreover, the testimony regarding the level of discipline issued to employees only substantiates that Respondent did not consistently enforce its dress code. For example, Union Steward Aaron VanVickle testified that he had never seen a verbal warning for dress code violations. (Tr. 196) Hansen testified that the proper level of discipline for a dress code violation is a written warning with a 1-day suspension. (Tr. 238; R. Ex. 3) Nevertheless, Hansen admits that his recommendation in this instance was a verbal warning. (Tr. 264-265) Thus, even under Respondent's own testimony, Respondent's discipline of employees was not consistent with its proffered reason for such discipline, or Respondent does not consistently enforce its policy.

C. The ALJ Correctly Found that Employees did Not Engage in an Unprotected Partial Strike. (Exceptions 2, 4, 12)

The record evidence and relevant caselaw supports the Administrative Law Judge's findings that the employees did not engage in an unlawful partial strike. (ALJD p. 10) As correctly noted by the Administrative Law Judge, although employees came to work in street clothes, they never withheld any of their services, and when employees were asked to change into their branded apparel, all but Whitmer, who typically relied on his wife to do the laundry and did not have any clean branded apparel to wear, immediately did so. (ALJD pp. 10-11)

Although Respondent argues that the branded apparel is necessary for employees to perform their positions and the premise technicians arrival at their work without the apparel shows they refused to perform one of their assigned duties, there is no evidence that that the branded apparel is necessary for employees to perform the functions at the garage before they leave Respondent's premises. According to Respondent's witnesses, branded apparel is necessary so employees can be recognized by customers as working on behalf of Respondent. (ALJD p. 10) The branded apparel guidelines address employee attire for customer-facing interactions. (Tr. 312; R. Ex. 3) However, to the extent the guidelines are enforced (which they are not), no customers are present at Respondent's garages. (Tr. 277) Moreover, employees travel in Respondent-branded vehicles and are required to wear ID badges. (Tr. 65-66, 140, 178-179, 209-210, 277) Employees can, and have, performed job functions in clothing other than branded apparel, so it is not an essential job duty. (Tr. 104-105, 292) There is no evidence that any of the premises technicians who participated in the protest arrived at customers' homes or businesses in street clothes. (ALJD p. 10)

The Administrative Law Judge correctly found that the employees did not engage in an unprotected partial strike, wherein within any given working day the employees refused to perform part of their assigned duty or to work the full day, because at no time did employees

refuse to engage in their job duties, and when asked to change into their branded apparel (which, as noted *supra*, Respondent does not always require), employees did so. Employees did not withhold their services, and continued on with their jobs when directed to change.

In support of its claim that employees engaged in a partial strike, Respondent cites to *Honolulu Rapid Transit Co.*, 110 NLRB 1806 (1954) (employees refused to work on Saturdays and Sundays in several consecutive weeks); *Yale Univ.*, 330 NLRB 246 (1999) (student teaching assistants refused to submit grades but performed their other duties), and *Audubon Health Care Center*, 268 NLRB 135 (1983) (nurses refused to cover duties in one section of the hospital while continuing to complete duties in their respective assigned sections). The Administrative Law Judge correctly distinguished all of these cases because here, the premises technicians were willing to perform all of their actual job duties and, except Whitmer, all quickly complied with the directive to change into company-branded apparel. Contrary to Respondent's claims, the employees never refused to comply with Respondent's dress code. There was no ongoing refusal of employer instructions which exceeded the bounds of protected conduct and became insubordination, and employees were not disciplined for insubordination. Employees simply conveyed their message, then carried on with their day as usual.

Respondent claims that the cases cited by the Administrative Judge in support of her decision that employees did not engage in a partial strike all involved employees complying with dress codes but adding items such as buttons to expressly show support for a union or to criticize the employer. This is not true. In *Medco Health Solutions*, 357 NLRB 170 (2011), cited by the Administrative Law Judge, the Board found that an employee was unlawfully fired for wearing a shirt critical of a company policy in violation of the employer's dress code. The shirt was not any kind of "addition," as shirts would always be required at work, and the shirt was expressly

contrary to the employer's dress code, which prohibited "degrading, confrontational, slanderous, insulting or provocative" apparel. The Board found that the employer violated the Act by terminating the employee who wore the shirt contrary to the employer's dress code.

The Judge's finding that employees did not lose protection of the Act is bolstered by the Board's decision in *E.R. Carpenter Co.,* 252 NLRB 18, 22 (1980). In *E.R. Carpenter Co.*, the Board adopted an administrative law judge's decision finding a violation of 8(a)(1) for firing employees for refusing to wear unsanitary and unsafe moon suits required for working with toxic material. The Board concluded the employees were engaged in protected concerted activity because the safety and sanitation of their suits were a term and condition of employment and they were protesting concertedly. *Id.* The Board noted that the employees did not lose the protections of the Act because their actions were not "unlawful," "violent," "in breach of contract," or "indefensible," citing *NLRB v. Washington Aluminum Company Inc.,* 370 U.S. 9 (1962). Specifically, the Board noted that refusal to work in a toxic atmosphere in deteriorating moons suits was in no way unlawful or indefensible. On the contrary, employees had good faith concerns their suits were unsafe. The Board also specifically dismissed the respondent's contention that the employees were engaged in a partial strike because at no time did the employees usurp the role of the employer and actively and defiantly perform some but not all of their work while insisting that they be paid for such tactics. Indeed, the employees offered to work in other protective garb and continued to carry out all other functions of their jobs.

Here, as in *E.R. Carpenter Co.*, employees offered to carry out all functions of their jobs in other apparel. When asked to change, they immediately did so. As in *E.R. Carpenter Co.*, the employees had complained about their workwear before. At no time did employees engage in

unlawful, violent, or indefensible actions, and since there was no collective-bargaining agreement in place, they could not have been in breach of contract. The employees engaged in protected concerted activity, were not engaged in a partial strike, did not engage in insubordination and were not disciplined for insubordination, and they did not lose protection of the Act in their brief protest.

In another analogous case, in *Expotel Hosp Servs., L.L.C. & Hhp-Phoenix, L.L.C., a Single Employer & Michelle A Evans, an Individual*, Case 28-CA-19185, 2004 WL 3051793 (Dec. 21, 2004), an administrative law judge found an 8(a)(1) violation for the discipline and discharge of an employee for refusing to wear a winter uniform rather than a summer uniform. The administrative law judge determined that the employee was engaged in protected concerted activity when she expressed concerns on behalf of her coworkers because the weather was still too hot for winter uniform attire. Thereafter, the employee, and other coworkers at her direction, refused to wear the winter uniform despite clear directives. The administrative law judge determined that the employee's conduct did not lose the protection of the Act simply because it could be insubordination. In making that determination, the administrative law judge balanced employees' Section 7 rights against an employer's rights to maintain order and respect. The administrative law judge specifically considered the employees' remarkably temperate conduct, stating, "to conclude that this much muted protest would be unprotected because of its insubordinate character alone would, as the Supreme Court said in *Washington Aluminum,* "prohibit even the most plainly protected kinds of concerted [activities] until and unless the permission of the company's [official] was obtained."

As in *Expotel Hosp. Servs.*, here, employees engaged in temperate conduct, and never actively or defiantly refused to perform work. Rather, they wished to convey a brief collective

message about an ongoing problem with their uniforms before proceeding with their day. Indeed, they chose a Friday to engage in this activity specifically so Respondent would take notice. (Tr. 53, 100, 116-117, 168) Although Respondent excepts to the Administrative Law Judge's conclusion that the employees' actions did not cause more than a *de minimis* delay in serving customers, the conclusion is supported by record evidence. The record reflects that nearly all employees were able to leave from the meeting at their normal start times. (Tr. 56-57, 110, 137-139, 206-208, 173, 195, 214, 217, 318, 339) Employees completed all of their assigned jobs for the day. (Tr. 267, 278-280) To the extent Respondent argues the lack of impact is not a relevant factor for determining whether the conduct constituted a partial strike or work slowdown, it is difficult to imagine how an employee could unlawfully strike or slowdown work with no impact on an Employer's operations, and Respondent has not cited any cases in support of their contention that an activity with no impact on an employer's operations could be considered a strike. Conspicuously, Respondent has also not cited to any case in which briefly wearing an item of clothing to draw attention to a workplace issue has been found to be a partial strike. The employees' conduct here was brief, peaceful and muted, and certainly did not cross any bounds as to render the conduct "indefensible," "violent," or "unlawful" so as to render it an unprotected partial strike.

IV. The Employees did not Engage in an Unprotected Deliberate Slowdown. (Exceptions 3, 4)

The Administrative Law Judge correctly did not find that the premises technicians were engaged in a deliberate slowdown of work. Although some employees had to leave Respondent's premises to retrieve their branded apparel, the Administrative Law Judge correctly found that Respondent's order requiring employees to change was not based on a consistently enforced work rule. (ALJD p. 11) Moreover, nearly all employees were able to leave from the

meeting at their normal start times. (Tr. 56-57, 110, 137-139, 206-208, 173, 195, 214, 217, 318, 339) Thus, as noted above the Administrative Law Judge correctly found that the impact on Respondent's operation was extremely minimal, if any.

Contrary to *Elk Lumber Co.*, 91 NLRB 333 (1950), cited by Respondent in support of its claim that employees were engaged in a deliberate unlawful work slowdown, there is no evidence that employees decreased production on the day in question. Although Respondent maintains that it lost over 18 hours of labor, Respondent has provided nothing but bare assertions of such a claim, particularly given that employees are required to complete all generated tickets or jobs each day, and the jobs are created before the start of each workday. (Tr. 267, 278-280) The record testimony reflects that employees completed all of their assigned jobs for the day, and employees were not paid for the time they spent retrieving their branded apparel. (Tr. 267, 278-280) The employees completing these jobs were not subject to working overtime since Respondent deducted the employees' hours for changing from their workday. This supports the opposite conclusion from what is claimed by Respondent – that employees were able to complete their work more quickly than usual. Thus, Respondent's self-serving claim of any negative impact on operations must be disregarded.

IV. The Administrative Law Judge Correctly Found That There is no Evidence That the Premises Technicians' Actions Rose to the Level of a Breach of Contract. (Exception 11)

Respondent excepts to the Administrative Law Judge's finding that "there is no evidence that [the premises technicians]' action rose to the level of a 'breach of contract' that would render the actions unprotected. In support, Respondent maintains that the parties' collective-bargaining agreement expressly authorizes Respondent to implement appearance standards and/or a dress code and to change the standards and dress code at its discretion. As an initial

matter, at the time the events in question occurred, the most recent collective-bargaining agreement had expired and the parties were not working under a valid contract. (Tr. 40, 76-77, 239) Further, as explained by the Administrative Law Judge and as reinforced by the caselaw cited above, Respondent did not uniformly enforce its dress code, and the employees' conduct here was brief, peaceful and muted, and did not cross any bounds as to render the conduct "indefensible," "violent," or "unlawful" so as to render it an unprotected partial strike.

V. The Administrative Law Judge Correctly Ordered Backpay for the Premises Technicians Who Left the Facility to Retrieve Their Branded Apparel. (Exception 5)

Respondent excepts to the Administrative Law Judge's conclusion that premises technicians who left work to retrieve their branded apparel should be paid for the time they were not working on September 7, 2018. The Administrative Law Judge's conclusion is supported by the record. While Respondent claims that this is not compensable time, as noted above, the employees were sent home and thus lost the hours worked as a result of their protected concerted activity, not because of their violation of any consistently-enforced work rule. Given Respondent's prior lack of enforcement of its dress code, the evidence establishes that if the employees had not engaged in the protected concerted activity, they would not have been sent home and would not have lost the time in question. Respondent's claim that the Administrative Law Judge's backpay order would create an unworkable precedent is therefore inaccurate. If an employer had a consistently enforced work rule, it would be free to send employees home to retrieve such items without compensation. However, here, Respondent cannot take employees' pay, subjecting employees to essentially a suspension, for their protected concerted or union activity. There is no testimony that employees were ever sent home to change for violations of the dress code in the past. To the extent that Respondent's witnesses claimed that they have sent

employees home for instances like not arriving to work with driver's license, Respondent provided no evidence in support of such a claim outside of the bare unsupported testimony. (Tr. 262, 274) There is also no testimony that employees received attendance/punctuality discussion forms in their files when such instances occurred. Therefore, the lost time is appropriately compensable as determined by the Administrative Law Judge.

VI. CONCLUSION

Based on the record as a whole, and for the reasons referred to herein, Counsel for the General Counsel submits that Respondent's exceptions should be rejected and that the Administrative Law Judge's legal and factual conclusions be affirmed.

Dated: June 9, 2020

Respectfully submitted,

/s/ Zuzana Murarova

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CERTIFICATE OF SERVICE

June 9, 2020

I hereby certify that I served the attached Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and its Brief Filed in Support Thereof on all parties by electronic mail to the following addresses listed below:

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